

122 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

The Electric Plant Board of the City
of Paducah, Kentucky

Project No. 12911-003

ORDER DENYING REHEARING

(Issued January 17, 2008)

1. The Electric Plant Board of the City of Paducah, Kentucky (Paducah) has filed a request for rehearing of our October 18, 2007, order denying Paducah's motion for extension of time, for stay, and request for waiver. Paducah's motion was intended to allow it to file a development application in competition with previously-filed preliminary permit applications. Because Paducah presents no reason for us to reverse our longstanding policies promoting fair competition in hydropower licensing, we deny rehearing.

Background

2. The background of this case is set forth in detail in our previous order in this proceeding.¹ In essence, our regulations with respect to competition with preliminary permit applications provide that once a permit application has been filed, there is a 120-day period during which entities that have already been working on development applications may complete and file those applications.² Paducah filed a preliminary permit application to develop a project at the Robert C. Byrd Locks and Dam approximately one month after permit applications for the project site had been filed by the City of Wadsworth, Ohio, and by Rathgar Associates. Notwithstanding the fact that Paducah had not been working on a development application at the time that the permit

¹ See *The Electric Plant Board of the City of Paducah, Kentucky*, 121 FERC ¶ 61,051 (2007) (October 18 Order).

² See *id.* at P 17-25.

applications were filed, it subsequently filed a motion requesting waivers of substantial portions of our licensing regulations so that it could prepare and file a development application, to compete with Wadsworth's and Rathgar's earlier-filed permit applications. Paducah asked that it be allowed to use the traditional licensing process, which it perceived as allowing it to complete a license application more quickly than the integrated process, which our regulations establish as the default process, and that it be allowed to forego much of the prefiling public notice and consultation procedure required by the regulations.

3. By letter dated August 16, 2007, Commission staff denied Paducah's request. Paducah thereafter filed with the Commission a motion requesting the same relief that our staff had denied, as well as a request for rehearing of the staff letter. In our October 18 Order, we denied rehearing of staff's letter and also denied Paducah's motion, based on longstanding regulation, policy, and precedent.

4. Paducah now seeks rehearing of the October 18 Order, to the extent that it denied Paducah's motion.

Discussion

5. Paducah essentially reiterates the arguments it made in the prior request for rehearing, which we denied in the October 18 Order. Thus, we can quickly dispose of those arguments.

6. Much of Paducah's argument is premised on its assertion that we are mistaken in our interpretation of Order No. 413, which established the current competition rules.³ We explained in the October 18 Order that in establishing a short window for the filing of development applications in competition with filed permit applications, we explicitly intended to discourage situations, such as that presented here, in which applicants file hastily-prepared development applications merely as a tactic, when they have not completed the necessary studies that are a predicate to an acceptable application. We quoted the preamble to Order No. 413 to the effect that the short window after the acceptance of a permit application for other entities to file development applications was only to allow prospective competing applicants that have already completed, or very quickly can complete, all necessary studies and pre-filing consultations, a short additional

³ See *Application for License, Permit, and Exemption from Licensing for Water Power Projects*, 50 Fed. Reg. 11658 (March 25, 1985), FERC Stats. & Regs., Regulations Preambles 1982-1985, ¶ 30,632 (1985).

time to finish their applications.⁴ We also cited several instances in which we had construed the regulations just as we do here.⁵

7. Paducah nonetheless argues that we misunderstand our own statements and the context in which they were made. Aside from the fact that we have previously addressed and refuted this argument,⁶ we are left with little to say other than that Paducah is flat wrong. Our policy was clear when it was enunciated in Order No. 413, we have interpreted it in a consistent manner over the years, and Paducah's attempt to obfuscate the matter must fail. In addition, Paducah also fails to even address the precedent cited in the October 18 Order that demonstrates that our current interpretation of the regulations is consistent with longstanding practice.

8. Paducah also takes issue with our declining to waive substantial portions of our regulations in order to allow it to file an application in competition with the permit applications.

9. Our regulations establish a procedure that is fair to both permit and license applicants. Thus, an entity that has been working on a license application at the time that a permit application is filed is given a short amount of time to finish and file the license application. This prevents an entity from locking up a potential project site through the filing of a permit application to the detriment of an entity that has in good faith been pursuing, but has not yet completed, a license application. By the same token, the regulations are intended to preclude an entity from unfairly trumping a permit application by hastily pulling together a development application when it finds out that a permit application has been filed. This system encourages fair competition, but discourages gamesmanship.

10. Paducah is attempting to do exactly what our policy is intended to prevent. Paducah filed a preliminary permit application after Wadsworth and Rathgar did. Thus, given our policy of favoring the first-filed application where all else is equal, it may turn out that Paducah is not granted a permit to study the Robert Byrd Project. To avoid this possibility, Paducah, which has not alleged that it was working on a license application when the permit applications were filed, has asked us to waive our regulations to give it

⁴ 121 FERC ¶ 61,051 at P 22.

⁵ *Id.* at P 23 and n.29.

⁶ *Id.* at n.26.

an opportunity to trump the earlier-filed permit applications. We decline to do so, for concerns that extend even beyond our desire to promote fair competition.⁷

11. All of the processes under which the Commission sites energy projects have at their heart extensive consultation with the general public, as well as with affected state and federal resource agencies, and the requirement that the applicant conduct those studies that the Commission determines, after public input, are necessary for a full understanding of the effects of the proposed project. While our traditional hydropower licensing process does contemplate that more of the development of the environmental record may take place after an application is filed than does the integrated process, both processes demand extensive consultation and information development before an application is filed. As we explained in the October 18 Order, Paducah, whether in pursuit of an application under the traditional or the integrated processes, asks us to waive substantial portions of our regulations to radically reduce, if not eliminate, public and agency consultation regarding the proposed project, and to allow it to proceed on environmental information that is at best sketchy.⁸ As we have noted, Paducah provides no explanation of why this would be in the public interest. As far as we can tell, Paducah would be the only beneficiary of the proposed waivers, while its competitors and the public would be the losers. We cannot countenance such a result.

12. Paducah also reiterates its earlier arguments that it is not fair for the Commission to put Paducah in a position where it cannot complete a license application within the competition deadline.⁹ As we explained in the October 18 Order, Paducah has no right to

⁷ Paducah purports to be confused about why we are, in its view, allowing our concern for good faith competition to override our preference for development applications. Request for rehearing at 21-22. It is true that, all things being equal, we prefer development applications over preliminary permit applications, since the latter present a better-developed project proposal. *See* 18 C.F.R. § 4.37(a) (2007). Here, however, all things are not equal. Paducah is asking us to bend our rules to give it an unearned advantage over other entities, without presenting us with any convincing justification for its extraordinary requests. It cannot fairly claim surprise that we have denied them.

⁸ 121 FERC ¶ 61,051 at P 26-27.

⁹ Paducah asserts that no integrated process can ever be well-advanced when a preliminary permit application is filed. Request for rehearing at 16. It also contends that our policy “effectively bars everyone from submitting a license application in competition with a preliminary permit application.” Request for rehearing at 24. This is simply not true. As we contemplated in Order No. 413, a preliminary permit application could be filed shortly before the completion of either the integrated or the traditional licensing process, at a time when the license applicant could then quickly finish and file

(continued...)

be allowed to file an application in competition with the permit applications. It will not always be the case that there will be time for a development application to compete with a permit application.¹⁰ There is nothing wrong with this. Moreover, Paducah is not in a unique position here. Any constraints on completing a development application in these proceedings apply not only to Paducah, but to all other parties. The fact is that Paducah filed a preliminary permit application well after two other entities, a circumstance of its own making. We will not disregard our long-time competition policies and the public involvement aspects of our regulations in order to allow Paducah to avoid the consequences of its own actions.¹¹

13. Finally, Paducah asks us to clarify that, while we stated in the October 18 Order that Paducah has challenged the timeliness of Wadworth's and Rathgar's preliminary permit applications, in fact it is the Kentucky Municipal Power Agency, of which Paducah is a member, which has done so. While this misstatement is of no consequence, we grant the requested clarification.

its application. It may be the case that if a prospective applicant has not taken the sensible step of protecting itself by obtaining a preliminary permit before beginning the licensing process, it might be faced with a permit application filed at a point in the process when the prospective license applicant was not ready to complete its application. Should we be faced with such a case, we would determine what action was appropriate. However, that is not the situation here. No matter what theoretical concerns it espouses, Paducah cannot overcome the fatal flaw in its position – it is seeking to “game” the process to overcome the fact that others filed permit applications before it did, and it has advanced no convincing reason why the Commission should allow it to do so.

¹⁰ 121 FERC ¶ 61,051 at P 37.

¹¹ Paducah again cites as precedent one instance, involving the Meldahl Project No. 12667, where we waived certain of our prefiling regulations and allowed the applicants to use the traditional process, yet Paducah continues to fail to acknowledge that both competitors in that proceeding sought similar waivers and did not object to the proposed procedures, so that there was no issue of unfair competition there. Moreover, the affected resource agencies in the Meldahl proceedings did not object to the shortened consultation process, while Paducah has made no showing that such is the case here. Indeed, on the contrary, at least one agency, the Ohio Department of Natural Resources, informed Paducah that further consultation would be required. *See* 121 FERC ¶ 61,051 at n.39, *citing* Paducah's September 17, 2007 request for rehearing at Exhibit 5.

The Commission orders:

The request for rehearing filed by The Electric Plant Board of the City of Paducah, Kentucky on November 19, 2007, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.